**KAM PAU SIONG & ANOR**

**v.**

**WILAYAH FABRICATION SDN BHD & ORS**

COURT OF APPEAL, KUALA LUMPUR
MOHD NOOR AHMAD JCA
ALAUDDIN MOHD SHERIFF JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: S-02-118-97]
16 APRIL 2004

***CIVIL PROCEDURE:*** *Execution - Garnishment - Claim for sum of money owed by garnishee to judgment debtor - Whether judgment creditor has priority over debenture holder's claim - Receivers and managers appointed under deed of debenture - Whether invalid - Whether judgment creditor has priority over claim in view thereof*

The appellants obtained judgment in default against the 1st respondent in the sum of RM270,965.07 with interest. As judgment creditors, they commenced garnishee proceedings against the 2nd respondent claiming that the latter was indebted to the 1st respondent in a sum of more than RM300,000. The deputy registrar refused to make the garnishee order absolute, thereby giving priority to the 3rd respondent's claim for the said sum based on a deed of debenture made between the 1st respondent and the 3rd respondent ('the debenture'). The 3rd respondent had appointed receivers and managers under the debenture. The appellants' appeal to the judge in chambers was also dismissed. Hence, their appeal herein. The issues were: (1) whether the 3rd respondent had properly appointed receivers and managers pursuant to the debenture to entitle them to the sum of money held by the 2nd respondent as garnishee; and (2) whether the appellants had failed to file an affidavit to challenge the evidence of facts.

**Held (allowing the appeal)**
**Per Mohd Ghazali Mohd Yusoff JCA:**

**[1]** The 3rd respondent bore the evidential burden of proving that the debenture had crystallized and that such crystallization occurred pursuant to the terms and conditions of the debenture. However, it had only shown the existence of the debenture, the existence of the certificate of registration thereof with the Registry of Companies and the existence of the notice of appointment of the receivers and managers. There was no evidence that the 1st respondent had defaulted under the terms and conditions of the debenture. There must be default first before the appointment of the receivers and

managers could be made. Without this evidence, the appointment of the receivers and managers were not valid. Therefore the 3rd respondent had not sufficiently established its stand that circumstances had arisen entitling it to appoint the receivers and managers. (pp 830 e-h & 831 a)

**[2]** The appellants would need to file an affidavit if the intention was to reply specifically to allegations of fact made in the 3rd respondent's affidavit but what the appellants were contending was that the 3rd respondent failed to show that it had sufficiently proved its case. This was an allegation of law and hence there was no necessity for an affidavit in reply. (p 831 b-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu memperoleh penghakiman ingkar terhadap responden berjumlah RM270,965.07 beserta faedah. Sebagai pemiutang penghakiman, perayu memulakan prosiding garnisi terhadap responden kedua menuntut bahawa pihak terkemudian tersebut telah terhutang kepada responden pertama sebanyak lebih RM300,000. Timbalan pendaftar enggan mengeluarkan perintah mutlak garnisi sekaligus memberikan prioriti kepada tuntutan responden ketiga terhadap jumlah tersebut berdasarkan suratikatan debentur yang dibuat di antara responden pertama dan responden ketiga ('debentur'). Responden ketiga telah melantik penerima dan pengurus di bawah debentur. Rayuan perayu kepada hakim dalam kamar juga telah ditolak dan perayu telah merayu. Isu-isunya adalah: (1) sama ada responden ketiga telah dengan wajarnya melantik penerima dan pengurus berdasarkan kepada debentur sekaligus membolehkan mereka mendapat jumlah wang yang dipegang oleh responden kedua selaku pihak yang digarnis; (ii) sama ada perayu gagal memfail afidavit bagi mencabar keterangan-keterangan fakta.

**Diputuskan (membenarkan rayuan)**
**Oleh Mohd Ghazali Mohd Yusoff HMR:**

**[1]** Responden ketiga memikul beban bukti bagi membuktikan bahawa debentur telah matang dan bahawa pematangan itu berlaku di bawah syarat dan terma-terma debentur. Responden ketiga, bagaimanapun, hanya membuktikan kewujudan debentur, kewujudan sijil pendaftarannya dengan Pejabat Pendaftar Syarikat dan kewujudan notis perlantikan penerima dan pengurus. Tiada keterangan yang menunjukkan bahawa responden pertama telah mungkir di bawah syarat dan terma debentur. Harus terlebih dahulu wujud kemungkiran sebelum penerima dan pengurus boleh dilantik. Tanpa keterangan sedemikian, perlantikan penerima dan pengurus adalah tak sah. Oleh itu, responden ketiga gagal membuktikan pendiriannya bahawa wujud halkeadaan yang membolehkannya melantik penerima dan pengurus.

**[2]** Perayu perlu memfail afidavit jika niatnya adalah khusus untuk menjawab pengataan-pengataan fakta yang dibuat oleh responden ketiga dalam afidavitnya, namun apa yang dihujahkan oleh perayu adalah bahawa responden ketiga gagal membuktikan bahawa ia telah membuktikan kesnya dengan secukupnya. Ini adalah pengataan undang-undang dan kerana itu afidavit jawapan adalah tidak perlu.

**Case(s) referred to:**

*Abdul Samad Hj Alias & Anor v. Public Bank & Anor [1984] 2 CLJ 264; [1984] 1 CLJ (Rep) 57 FC* ***(refd)***

*Cairney v. Back [1906] 2 KB 746* ***(refd)***

*Hongkong and Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1986] 2 MLJ 86* ***(refd)***

*Kasofsky v. Kreegers (Phillips, claimant) [1937] 4 All ER 374* ***(refd)***

*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA* ***(refd)***

*South British Insurance Co Ltd v. Hj Ismail; Sin Kek Yeow (Intervener) [1964] MLJ 16* ***(refd)***

*Tan Joo Eng v. Siang Heng Co Ltd & Ors [1957] MLJ 18* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 111(2), 186

Evidence Act 1950, ss. 101, 102, 103, 106, 114(g)

Rules of the High Court 1980, O. 49 rr. 4, 6

*For the appellant - Collin Clark; M/s Clark & Co*

*For the respondent - Marianne Ghani; M/s James Ghani & Co*

*[Appeal from High Court, Kota Kinabalu; Suit No: K22-40-1995]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Mohd Ghazali Yusoff JCA:**

For ease of reference in this appeal, we would refer to the appellants as the plaintiffs, the 1st respondent as the defendant, the 2nd respondent as the garnishee and the 3rd respondent as Sabah Credit Corporation ("SCC").

The background to these proceedings are as follows:

(1) On 28 April 1995, the plaintiffs obtained a judgment in default against the defendant in the sum of RM270,965.07, together with interest at 14% per annum from 15 November 1994 to date of judgment and statutory interest at the rate of 8% per annum from the date of judgment to date of realisation and costs.

(2) On the same day, ie, 28 April 1995 the plaintiffs, as judgment creditors, initiated garnishee proceedings against the garnishee claiming that the latter was indebted to the defendant in the sum of more than RM300,000. The learned senior assistant registrar issued a garnishee order to show cause under O. 49 of the Rules of the High Court ("the rules").

(3) Consequently, the garnishee was ordered to show cause why the order nisi should not be made absolute. The hearing was scheduled for 5 May 1995 but was adjourned to and only heard on 16 May 1996, ie, about a year later.

(4) In the interim period, the following occurred:

(i) on 10 July 1995, one Abdul Rahim Hamid and one Gong Wee Ning of Messrs Coopers & Lybrand, pursuant to a deed of debenture, dated 11 July 1989, made between the defendant and SCC were appointed by SCC to be receivers and managers of the properties of the defendant under the powers contained in the debenture;

(ii) on 4 August 1995, a Mareva injunction obtained on 9 February 1994 by the garnishee against the defendant in another action (hereafter referred to as "the other action") was dissolved by the court; by that injunction the garnishee took possession of the defendant's monies lying in the defendant's account with them;

(iii) on 21 March 1996, the defendant's application to set aside the judgment in default obtained by the plaintiffs against it was dismissed; no appeal was filed against that decision.

At the hearing to show cause why the order nisi should not be made absolute before the learned deputy registrar, only counsel for the plaintiffs and the defendant appeared. The garnishee did not appear. SCC was not a party then at that stage of the proceedings.

The plaintiffs' counsel informed the learned deputy registrar that the order to show cause was properly served on the garnishee and it chose not to contest the application and as such, by virtue of O. 49 r. 4(1) of the rules, the court may make an order absolute against it. He also stressed that the defendant's counsel was not appearing as counsel for SCC but for the defendant which was then in receivership and that if SCC had a rival claim, it should intervene by way of interpleader.

The defendant's counsel however responded by arguing that the court should not make the order absolute for the reason that on the day SCC appointed receivers and managers to manage the defendant, *viz.*, 10 July 1995, the floating charge under the debenture crystallised into a fixed charge and hence SCC had priority. He also pointed out that in the judgment of Justice Ian Chin on 28 August 1995 in the other action, it was ordered that all monies of the defendant in its account with the garnishee be released to the defendant.

On 28 May 1996, the learned deputy registrar made the order absolute for the following reasons:

(a) O. 49 r. 4 of the rules provides the garnishee may appear to show cause why the order nisi should not be made absolute and in this case only the defendant, ie, the judgment debtor had appeared to resist the application.

(b) Under O. 49 r. 4 of the rules, it appears that only the garnishee may show cause. In support, he referred to the *Hongkong and Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86. In that case, the garnishor attempted to garnish the salary of the judgment debtor which was not due yet. The judgment debtor himself applied to set aside the order absolute. The court held that the order absolute should be set aside as there was no attachable debt. In the instant case the facts are different as it is not suggested that the debt in question is not due and anyway that case involved an application to set aside a garnishee order made absolute and not a case where a judgment debtor sought to show cause.

(c) The contention of the defendant's counsel that the monies have to be released to the defendant in priority over the plaintiffs as a result of the order made by Justice Ian Chin in the other action cannot hold water.

(d) The order to show cause was served before the appointment of the receivers and managers. The effect of service of the order to show cause was that although it did not operate as a transfer of property, it created an equitable charge and the garnishee cannot pay the debt to anybody but the plaintiffs as garnishors without incurring a risk of having to pay it over again (see *White Book* (1995 edition) para. 49/3/2).

(e) The appointment of the receivers and managers later by SCC, as submitted by counsel for the defendant, crystallised the floating charge into a fixed charge. Therefore if SCC intended to claim priority by virtue of being the debenture holder, it should have intervened.

(f) In all the cases cited by the defendant's counsel where third parties made rival claims, there were interpleader applications; in the instant case, there is none. Instead the defendant in receivership is resisting the claim.

(g) In *Abdul Samad bin Haji Alias & Anor v. Public Bank & Anor* [1984] 2 CLJ 264; [1984] 1 CLJ (Rep) 57, Hashim Yeop Sani FJ held:

> The words 'the court may order' in Order 49 rule 6(1) give discretion to the Court to order that the person who claims to be entitled to the debt sought to be attached attend before the Court and to state the nature of the claim with particulars thereof.

In the above case cited, notice was given to all concerned in the garnishment and to the Director of State Customs Sales Tax Branch. When the matter came on for hearing, neither the Director General of Customs nor his representative was present. The court held that as the Customs did not respond to the notice sent to them, no order could in any case have been made in their favour under O. 49 r. 6 of the rules.

The learned deputy registrar concluded that in the instant case, it is clear that SCC was aware of these proceedings as the receivers and managers were appointed by it; in the affidavit of counsel for the defendant dated 11 March 1996, there was an allusion to the claim of SCC. Therefore SCC should have intervened at this stage instead of leaving it to the defendant to object to the garnishee order being made absolute when the rules do not allow it to do so.

The defendant appealed to the judge in chambers. On 4 June 1996, the learned deputy registrar ordered a stay of execution pending the hearing of the appeal against his decision.

On 10 June 1996 SCC filed an application to be added as a party to the suit. This application was heard together with the appeal to the judge in chambers on 12 July 1996. On 10 August 1996, the learned judge allowed SCC to intervene at this stage of the proceedings and allowed the defendant's appeal with costs, *viz.*, the order absolute was set aside. He was of the view that the merits of the matter must be looked into and at this stage of the proceedings, he was not prepared to consider the merits of the matter as SCC did not argue the matter before the learned deputy registrar. He felt that the matter would be better dealt with by the learned deputy registrar and consequently made the following orders:

(a) SCC shall within 14 days hereof file an affidavit stating with particulars the nature of its claim;

(b) SCC shall within 14 days hereof serve the said affidavit on the plaintiffs and the defendant;

(c) the plaintiffs shall within 14 days of receipt of SCC's affidavit cause to be sworn an affidavit stating the grounds of their opposition to SCC's claim;

(d) SCC shall, if it wishes to, within seven days thereof reply to the plaintiffs' affidavit;

(e) the learned deputy registrar shall hereafter fix a date of hearing in order to hear submissions from counsel as to:

(i) whether the issues raised by the two affidavits aforesaid should be decided summarily and if so, he shall decide the same; or

(ii) whether the issues should be tried and if so, to give the necessary directions for trial and to try the issues himself.

In his grounds of decision the learned judge noted that at the hearing before the learned deputy registrar to show cause why the order nisi should not be made absolute, the garnishee did not appear. At the appeal before him, counsel for the garnishee, who was present, informed the court that the reason why the garnishee did not appear before the learned deputy registrar was because the garnishee was not served with the notice of that hearing. His statement was not challenged by the plaintiffs. The learned judge was of the view that before the learned deputy registrar, counsel for the plaintiffs were perhaps unaware that the garnishee had not been served with the notice of hearing when he insisted that the order should be made absolute in the absence of the garnishee and relied on O. 49 r. 4(1) of the Rules of the High Court 1980 which provides:

Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the court may, subject to r. 7, make an order absolute in one of the forms in Form 100 under r. 1 against the garnishee.

The learned judge also noted that the learned deputy registrar declined to exercise his discretion under O. 49 r. 6 of the rules and order SCC to attend before the court and state the nature of its claim as the learned deputy registrar found SCC had knowledge of the proceedings but yet did not intervene and that SCC should not have left it to the defendant to object to the order being made absolute.

Order 49 r. 6 of the rules provides:

(1) If in garnishee proceedings it is brought to the notice of the court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien upon it, the court may order that person to attend before the court and state the nature of his claim with particulars thereof.

(2) After hearing any person who attends before the court in compliance with an order under para. (1), the court may summarily determine the question at issue between the claimants or make such order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such other person as is mentioned in para. (1) be tried in such manner as is mentioned in r. 5.

The learned judge then went on to say that he allowed the application by SCC to intervene at this stage of the proceedings over the objection of the plaintiffs because he was of the view that SCC "should not be deprived of a hearing at the appellate stage when they entreated to be allowed to be heard and when they are most affected by any decision in the appeal herein". He then went on to say that parties have been allowed to intervene in very late stages of the proceedings, for example, after an order of possession was granted (see *Tan Joo Eng v. Siang Heng Co Ltd & Ors* [1957] MLJ 18) and after judgment had been entered (see *South British Insurance Co Ltd v. Haji Ismail; Sin Kek Yeow (Intervener)* [1964] MLJ 16). He was also of the view that even if SCC was not a party at the hearing to show cause, the learned deputy registrar "should have considered the merit of the case and that is whether the order should have been made absolute which in turn depends on the answer to the question whether there was an attachable debt at the date the order was made absolute".

At the "rehearing" of the notice to show cause as directed by the judge, the learned deputy registrar, on 10 January 1997, refused to make the garnishee order absolute. The plaintiffs appealed to the judge in chambers.

On 31 January 1997, the learned judge dismissed the appeal and awarded costs to SCC. The learned judge noted that the plaintiffs did not file any affidavit as directed by him and also noted that the plaintiffs' counsel rested his case on his submission which was as follows:

(a) there was no valid debenture;

(b) there was no valid appointment of receivers and managers; and

(c) there was no crystallization of the floating charge into a fixed charge;

while conceding that but for the alleged invalidity, SCC being the debenture holder would otherwise have priority over the monies lying in the bank account which the plaintiffs had garnished.

Before us, the plaintiffs' counsel argued the main issue in this appeal and the proceedings before the learned deputy registrar is, who is entitled to the money in the hands of the garnishee, ie, whether the plaintiffs or SCC. He then posed the question as to who bears the burden of proof. Counsel pointed out the plaintiffs had a judgment and an order nisi. SCC seeks to claim the money in the hands of the garnishee on the grounds that:

(a) there exists a debenture/charge in favour of SCC; and

(b) the charge had crystallised.

He argued that the burden of proof lies on SCC because:

(i) as SCC desires the court to give judgment as to its legal right dependent on the facts which SCC asserts, SCC must prove those facts exist (s. 101 Evidence Act 1950);

(ii) SCC would fail if no evidence were given as the plaintiffs already have a decree nisi (s. 102 Evidence Act 1950);

(iii) SCC wishes the court to believe that the debenture/charge had crystallised; the proof of this lies with SCC (s. 103 Evidence Act 1950);

(iv) the alleged crystallisation is a fact especially within the knowledge of SCC and therefore the burden of proving these facts lie with SCC (s. 106 Evidence Act 1950).

Thus, SCC bears the evidentiary burden of proving the following:

(a) the existence of the debenture/charge;

(b) the debenture/charge is a legally valid and effective document;

(c) the debenture/charge had crystallised;

(d) such crystallisation occurred pursuant to the terms and conditions of the debenture/charge.

Counsel pointed out the debenture is the document that determines the rights and liabilities of the parties to it. He insisted that conditions precedent to the appointment of the receivers and managers, eg, formal demand, must be observed. Strict adherence to the conditions in the debenture is required. Persons

that may challenge the appointment include a judgment creditor or an execution creditor. He then referred to pp. 45-46 of *Company Receivers and Managers* by James O'Donovan which read as follows:

> M. WHO MAY CHALLENGE THE APPOINTMENT?
>
> A challenge to the validity of an appointment may come from a number of quarters. ... Moreover, since the debenture gives its holder a secured interest a challenge can be mounted by the company's liquidator, another debenture holder and even a judgment creditor or an execution creditor.
>
> N. CONSEQUENCES OF AN INVALID APPOINTMENT
>
> A person who purports to take possession of the assets and property of a company as a receiver and manager under an invalid appointment may be held liable to the company as a trespasser. So too may the debenture holder responsible for his appointment. Yet if the company pursues this course of action it may be unable to recover the fruits of the receivership. Consequently, it may elect to treat the appointee as its agent and claim the benefits produced by his efforts. Where a person improperly assumes the position of a receiver and manager he may be held liable to account as such.
>
> O. CONCLUSION
>
> It is vitally important for the debenture holder and the appointee to ensure that a receivership begins on a firm foundation. Only when all conditions precedent have been strictly observed will the right to appoint arise.

Counsel argued the burden of proof was on SCC to show that the appointment of the receivers and managers was an appointment that could lawfully be made in the exercise of the powers given by the debenture. There is no presumption that will discharge SCC from proving that, if the appointment was made, the steps necessary to make a valid appointment had been taken. He then referred to *Kasofsky v. Kreegers (Phillips, Claimant)* [1937] 4 All ER 374. In that case, an execution creditor having seized certain goods of the debtor, the goods were claimed by a receiver appointed under a power given by a debenture deed. The appointment was dated the day after the execution of the deed. It was contended that such appointment was prima facie valid, and that it was for the creditor to show that none of the events specified in the deed as giving rise to the power had happened. The court held that it was for the receiver to prove the happening of one of the events specified in the debenture deed, and the maxim *omnia rite esse acta praesumuntur* (all acts are presumed to have been done rightly and regularly) had no application to such a case. Hilberry J said (at p. 378):

> The claimant has to establish a title which ousted that of the execution creditor to the goods which the sheriff had seized. The claimant said that his title was derived from a debenture and the action of the debenture holder, who, under the powers which had been given by the debenture, had appointed a receiver. In these circumstances, it was necessary, in establishing the claimant's asserted title, that the claimant should show that his appointment was an appointment which could lawfully be made in the exercise of the powers given by the debenture. In effect, all the claimant did to discharge the burden of proof was to produce the debenture, and to produce a written document which purported to be an appointment of himself as receiver of the debenture holder. I ought to refer to the terms and conditions of the debenture. If one considers those terms and conditions, it becomes perfectly apparent that, unless the conditions precedent to the appointment of the receiver were fulfilled at the time of the appointment, the receiver for the debenture was not even prima facie validly appointed, unless, as Mr Weitzman said, one could rely on the maxim omnia rite esse acta praesumuntur. I add these words only because I want to say that the maxim has not, and never had, any application to a case where there is a person in the position of the debenture holder, and the right to appoint a receiver is made conditional upon certain express terms in that document. There is no presumption which will discharge him from proving that, if the appointment is made, the steps necessary to make valid appointment have been taken.

Counsel argued if there is no evidence to show that the receivers and managers were properly appointed, there can be no crystallisation of the charge. He then referred to what Goddard J said in *Kasofsky v. Kreegers* at p. 377:

> But, if nothing had happened to give the debenture holder a right to appoint a receiver, the fact that she wrote on a piece of paper that she had appointed a receiver does not crystallise her charge, nor does it give a right to the receiver to take possession of the goods. ... There was no evidence at all upon which the master could hold that Phillips had been properly appointed a receiver, and that he had thereby got a good title to the possession of the goods. It is one thing to write out a paper saying that one has appointed a receiver. Unless circumstances have arisen to entitle one to make the appointment, and something has happened to crystallise the charge, that will not effect anything.

As such the claim by SCC, the debenture holder must fail. He then referred to cl. 2.03 of the debenture, entitled "*Conversion of Floating Charge Into Fixed Charge*" which reads:

> The Corporation may at any time by notice in writing to the Borrower forthwith convert the said Floating Charge over the properties and assets described in Article II hereof into a Fixed Charge as regards any properties and assets specified in the said notice which the Corporation shall in its absolute discretion consider to be in jeopardy or in danger of being seized or sold under any form of distress or execution levied or threatened and may appoint a receiver thereof.

Counsel also referred to cl. 8.01(a) of the debenture entitled *"Notice"* which reads:

> Any demand for payment of the monies secured and any notice or request required or permitted to be given or made under this Debenture to the Corporation shall be under the hands of any Manager or authorised signatory of the Corporation or a solicitor or firm of solicitors purporting to act for the Corporation to the addresses specified below.

Counsel argued that any "demand", "notice" or "request" shall be in writing and under the hands of any manager or authorised signatory of SCC or a solicitor. No notice in writing to the defendant as borrower as required by cl. 2.03 had been produced in evidence. A copy of the Form 59, annexed to SCC's affidavit (exh. "DGG4"), which was lodged by the receivers and managers pursuant to s. 186 of the Companies Act 1965, *viz*., to notify the appointment of the receivers and managers is of no assistance as it did not recite on what basis they were appointed. Counsel contended that such evidence was especially within the knowledge of SCC and the receivers and managers and s. 114(g) of the Evidence Act 1950 should apply under such circumstances.

Counsel argued cl. 5.01(c) of the debenture provides the manager of SCC may appoint any person to be receiver and or manager of the properties and assets hereby charged but that clause must be read as part of cl. 5.01 which at the outset states "At any time after the Corporation has declared the facility in default ...". He contended there is no evidence before the court of the "declaration" of the facility being in default. In fact, the only evidence before the court is para. 7 of the affidavit of the general manager of SCC, George A. Ginibun which is a bare statement. It reads:

> In the exercise of the powers so provided under the Deed of Debenture, SCC did on the 10th day of July 1995 appoint ... as Receivers and Managers of the Defendants.

The said George A. Ginibun then referred to exh. "DGG4" which is unhelpful. Again, this "declaration" is especially within the knowledge of SCC and the receivers and managers and that had not been produced. As such s. 114(g) of the Evidence Act should apply under such circumstances. Counsel referred again to what was said by Hilbery J in *Kasofsky v. Kreegers, viz*., that unless the conditions precedent to the appointment of the receiver for the debenture holder were fulfilled at the time of the appointment, the receiver for the debenture holder was not even prima facie validly appointed. He contended that an invalid appointment does not crystallise the debenture.

Counsel concluded by arguing that since there was no evidence that the pre-conditions for the appointment of the receivers and managers had been complied, hence the appointment is invalid resulting in no crystallisation of the debenture. Therefore the debenture is void as against the plaintiffs.

In opposing the appeal, SCC's counsel referred to paras. 5, 6 7 and 8 of the affidavit of the general manager of SCC, George A. Ginibun which reads:

> 5. In accordance to Section 108 of the Companies Act, 1965, the Debenture was duly registered with the Registrar of Companies and a Certificate of the registration of Charge (Form 40) was duly issued in respect thereof. A true copy of Form 40 dated the 11th day of April, 1989 is exhibited hereto and marked as "DGG-3".
>
> 6. It is also known to me that pursuant to Article V of the Debenture, SCC is entitled that *inter alia* in the event that the Defendants default under the terms and conditions of the Loan Facility, appoint any person as Receiver and Manager to the properties as charged under the said Debenture with powers as provided under Article 5.02 therein.
>
> 7. In the exercise of the powers so provided under the Deed of Debenture, SCC did on the 10th of July, 195 appoint Messrs Abdul Rahim Hamid (NRIC. NO. 500607-01-5171) and Gong Wee Ning (NRIC NO. 461023-08-5441) both of Messrs Coopers & Lybrand, of the 15th Floor, IGB Plaza, Jalan Kampar, Off Jalan Tun Razak, 50400 Kuala Lumpur as Receivers and Managers of the Defendants. A true copy of Form 59, Notice of Appointment of Receivers and Managers dated the 10th day of July, 1995 and filed with the Receivers (sic) of Companies is annexed hereto as Exhibit "DGG-4".
>
> 8. I am advised and verily believe that upon the appointment of the Receivers and Managers on the 10th day of July, 1995, all of SCC's floating charge over the properties, assets and undertakings of the Defendants crystallised into a fixed charge in favour of SCC and are to be taken into possession by the Receivers and Managers thereon appointed.

Counsel argued this affidavit was uncontroverted, unrebutted and never challenged or at all by the plaintiffs. The plaintiffs' failure to file an affidavit in opposition to SCC's affidavit means SCC's stand that it has a prior claim on interest in the money garnished was not rebutted and never answered and hence must be taken to have been admitted by the plaintiffs. She then referred to, *inter alia*, *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 where the Court of Appeal held in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

In reply to the contention of the plaintiffs that there was nothing for them to aver to by way of affidavit on the grounds that their submission were based upon issues of law only, counsel pointed out the plaintiffs failed to comply with the order given by Justice Ian Chin, *viz.*, that the plaintiffs shall within 14 days of the receipt of SCC's affidavit cause to be sworn an affidavit stating the grounds of their opposition to SCC's claim. Counsel contended SCC have adduced evidence to show that the charge being the debenture was properly registered with the Registry of Companies and that the receivers and managers were validly appointed pursuant to the powers as per the debenture. She pointed out it was only during the hearing before the learned deputy registrar that SCC became aware for the first time that the plaintiffs intended to raise the issue as to whether the debenture had crystallised and thus whether SCC's claim took priority over the plaintiffs' claim. This, she contended, was subsequent to the plaintiffs' failure to file an affidavit in opposition as ordered by Justice Ian Chin. Had the plaintiffs put in an affidavit in opposition thereby challenging SCC's averments of fact, SCC would have been given the opportunity to meet the plaintiffs' contentions. Thus, there can be no question herein that SCC had ever or at all suppressed any or at all relevant information and/or facts.

Counsel then submitted the receiver's title prevails even if the garnishee order is made absolute before he is appointed unless the money has been actually paid over under the order. She then referred to *Cairney v. Back* [1906] 2 KB 746. The facts of that case are as follows:

(1) On 27 January 1906, a limited company issued to the plaintiff a mortgage debenture creating a first charge by way of floating security over all the property for the time being of the company.

(2) On 15 June 1906, the defendant obtained judgment against the company and on the same date obtained and served a garnishee order nisi on a bank with which the company had an account which was then in credit to the extent of £166, 5s and 3d.

(3) On 25 June 1906 the garnishee order was made absolute.

(4) On 29 June 1906 a receiver of the assets of the company was appointed on behalf of the plaintiff under the powers contained in his debenture.

The bank obtained relief by way of interpleader and brought the money into court. At the trial of the interpleader issue, a question raised, *inter alia*, was whether a sum of £98, 3s and 4d, part of the said sum of £166, 5s and 3d was the property of the plaintiff under and by virtue of the mortgage debenture in his favour from the company or whether that sum of money was payable to the defendant under the garnishee order. The learned judge concluded the

rights of the plaintiff, Cairney under his debenture must prevail over the rights of the defendant, Back under the garnishee order absolute. The learned judge held that a garnishee order absolute does not transfer to the garnishor the property in the garnished debt, and that consequently the fact that the receiver was not appointed until after the garnishee order had been made absolute was immaterial, and that the plaintiff was therefore entitled to the money in priority of the defendant.

We have allowed the plaintiffs' appeal with costs. We now give our reasons. The evidence clearly showed the following:

(a) that on 11 July 1989, SCC issued a debenture to the defendant creating a charge over certain lands, the undertaking and all other properties and assets of the defendant and the stock-in-trade, raw materials, uncalled capital and trade debts of the defendant both present and future;

(b) that on 11 August 1989 the Registry of Companies issued a certificate entitled "Certificate of Registration of Charge" pursuant to s. 111(2) of the Companies Act 1965;

(c) that on 10 July 1995 SCC appointed receivers and managers of the properties of the defendant pursuant to the powers contained in the said debenture.

The only issue, before us, is whether SCC has succeeded in showing that there was crystallisation and hence, that the receivers and managers were properly appointed. We have noted that in *Cairney v. Back*, it was decided that until a judgment creditor obtains actual payment, a receiver for a debenture holder, even though appointed subsequently to the garnishee order absolute, will obtain priority over the judgment creditor. Thus, under such circumstances, the receiver would have the edge in priority. But then, we are of the view that SCC would still bear the evidentiary burden of proving that the debenture had crystallised and that such crystallisation occurred pursuant to the terms and conditions of the debenture. We find that SCC had only shown the existence of the debenture, the existence of the certificate of the registration of the charge with the Registry of Companies and the existence of the notice of appointment of the receivers and managers but there is no evidence that the defendant had defaulted under the terms and conditions of the debenture. We would agree with the contention of the plaintiff's counsel that the affidavit of the general manager of SCC, George A. Ginibun merely stated that the appointment of the receivers and managers were made under the powers so provided under the debenture. We are of the view that there must have been a default first before the appointment of the receivers and managers can be made, and without this evidence, we cannot see how it can be argued that the receivers and managers were validly

appointed. We have perused the affidavit of the general manager of SCC, George A. Ginibun and nowhere have we found any evidence showing the "declaration" of the facility being in default as provided for under cl. 5.01 of the debenture.

We find that SCC had not sufficiently established its stand that circumstances had arisen which would entitle it to appoint the receivers and managers. SCC has to show that the defendant had defaulted and this it has not done. Counsel for SCC had pointed out that the plaintiffs failed to file an affidavit to challenge the evidence of facts. We are not with him. We would agree that the plaintiffs would need to file an affidavit if the intention was to reply specifically to allegations of fact made in SCC's affidavit but then, at the appeal before us and also in the court below, what the plaintiffs are contending is simply that SCC failed to show that it has sufficiently proved its case. This is an allegation of law and hence we do not see the necessity of an affidavit in reply.

The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950. In accordance with s. 101 of the Act, the legal burden of establishing that circumstances had arisen which would entitle SCC to appoint the receivers and managers, lie on SCC. We would agree with the contention of the plaintiff's counsel that up to now there is insufficient evidence to show that the debenture had crystallised. SCC would need to illustrate that the defendant had defaulted under the terms and conditions of the debenture. The burden of proof lies on SCC to show there was crystallization and that the receivers and managers were properly appointed. Since no such evidence is before us, we are of the view that the stand of SCC that the debenture had crystallised cannot stand at all. As there is nothing before us which could show the basis upon which the right to appoint the receivers and managers had arisen and that the conditions precedent prior to such appointment were fulfilled, we are of the view that the learned deputy registrar did not exercise his discretion judiciously when he refused to make the garnishee order absolute under the circumstances.

For these reasons, we allowed this appeal with costs here and below. The orders of the learned senior assistant registrar and the learned judge are hereby set aside and we allow the plaintiffs' application for a garnishee order absolute. We also order that the deposit be remitted back to the plaintiff.